

***United States Court of Appeals
for the Second Circuit***

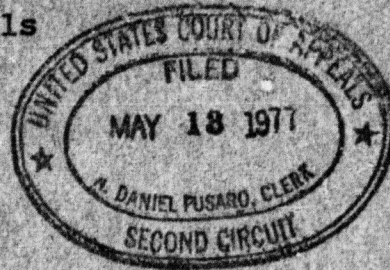


**BRIEF FOR
APPELLEE**

77-7052

To be argued by
Joel C. Balsam

United States Court of Appeals
For the Second Circuit



BISWANATH HALDER,

Plaintiff-Appellant,

against

RCA CORPORATION,

Defendant-Appellee.

Appeal from a Judgment of the United States District Court
for the Eastern District of New York

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UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-7052

BISWANATH HALDER,

Plaintiff-Appellant,

against

RCA CORPORATION,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE

PRELIMINARY STATEMENT

This brief is submitted on behalf of defendant-appellee RCA Corporation ("RCA" or the "Company") in opposition to this appeal being taken by plaintiff-appellant Biswanath Halder ("Halder") from a judgment of the United States District Court for the Eastern District of New York, per Mishler, C.J., entered December 23, 1976, dismissing the complaint herein and from orders of the District Court, per Mishler, C.J., previously entered, denying plaintiff's motions to amend his complaint and to compel production of documents and answers to interrogatories.

QUESTIONS PRESENTED

Whether the District Court abused its discretion in dismissing plaintiff's complaint after a trial at which plaintiff refused to proceed.

Whether the District Court abused its discretion in denying plaintiff's motion seeking to compel defendant to produce documents and answer interrogatories.

Whether the District Court abused its discretion in denying plaintiff's motion to amend his complaint.

STATEMENT OF THE CASE

In this action plaintiff Biswanath Halder alleges RCA failed to hire him as a computer programmer or analyst by reason of his Indian national origin. The proceeding is one of 11 cases which Halder has brought on the same grounds under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., ("Title VII") in the United States District Court for the Eastern District of New York against companies for not offering him a position as a computer programmer or analyst. At least three of these cases, having been consolidated, were previously dismissed and appealed by Halder to this Court on almost precisely the same grounds as the instant case. In that appeal, Halder v. Sperry Rand Co., Docket No. 76-7145 (2d Cir.

November 15, 1976), the District Court's judgments dismissing the complaints were affirmed.

Halder purportedly applied to RCA for employment on some eleven separate occasions between February 3, 1969 and May 10, 1971 and was not offered a job. Three other applications for employment alleged in his Amended Complaint of December 26, 1974 were to RCA Global Communications, Inc. ("RCA Global"), an entirely separate corporate entity, against whom no charges were ever filed with the EEOC and on whom no service of summons or complaint has been made in this action.

Halder now appeals from the judgment of the United States District Court for the Eastern District of New York (Mishler, C.J.), entered December 23, 1976,* dismissing his first amended complaint (D 46).** Dismissal was on the ground that when the action came on for trial, Halder failed to proceed. Halder also appeals from the District Court's denial of his pre-trial motions to compel production of documents and answers to interrogatories (D 45), and to again amend the complaint to include a cause of action based on 42 U.S.C. § 1981 and to join RCA Global as an additional defendant (D 24). These denials

* The judgment was dated December 22, 1976, the date of trial, but filed December 23, 1976. Plaintiff in his notice of appeal refers to the judgment entered December 22, 1976. It is attached on the last (unnumbered) page of plaintiff's brief to this Court.

** Since Halder moved this Court for an order to permit his appeal to be heard on the original record in lieu of an appendix, reference to the record will be by document number on the docket sheet, and by page: "D , p. ."

were in response to some of the latest of a myriad of frivolous and repetitive motions of plaintiff in this action. As recognized by this Court, Halder has similarly engaged in this dilatory and burdensome practice in his many other unsuccessful Title VII suits.

Notice of appeal from the final judgment by the District Court dismissing the action was filed January 21, 1977.

STATEMENT OF THE FACTS

Plaintiff Biswanath Halder is a person of Indian national origin. In 1969 he came to this country as an alien. Since then he allegedly applied for employment to RCA, its divisions and subsidiaries, on 14 separate occasions commencing in February 1969. He alleges that 10 of these applications were rejected, and that on the other four occasions he received no reply (D 5).

As set forth in his complaint, plaintiff filed charges with the Equal Employment Opportunity Commission ("EEOC") on or about February 21, 1971 charging RCA with discrimination against him because of his Indian national origin (D 5). Subsequently the EEOC conducted an investigation and issued a Determination on October 31, 1973 (D 29, Ex C.). In that Determination, the EEOC found that there was "no reasonable

cause to believe that Respondent [RCA] engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, as amended, as alleged."*

No further action was taken by Halder until July, 1974 at which time, at his request, the EEOC sent plaintiff a Notice of Right to Sue. Halder then commenced this action on September 25, 1974 (D 2). At or about this time plaintiff commenced actions against seven other companies making substantially the same allegations asserted against RCA. Defendant duly answered (D 4), and thereafter, on December 26, 1974 Halder made the first of three motions for leave to amend his complaint (D 5), that motion being granted on February 24, 1975 (D 7).

In the interim, on January 27, 1975 plaintiff Halder served RCA with the first set of broad and sweeping Interrogatories which have principally resulted in numerous subsequent motions, the denial of which serve as part of the basis for this appeal (D 6). However, pending final resolution of RCA's motion to dismiss this action, all discovery was stayed. The action was dismissed (D 14), and then ultimately reinstated after a determination by this Court in another action, De Matteis

* The EEOC also found that "respondent's records show that between April 1969 and February 1971, 15 employees were hired in the Computer Systems Division whose names appear to be of Indian national origin. Respondent no longer has a Computer Systems Division."

v. Eastman Lak Co., 520 F.2d 409 (2d Cir. 1975), that although a complaint may not be timely, a plaintiff should not be penalized as a result of improper EEOC procedures.

The Interrogatories requested vast amounts of detailed information relating both to RCA's methods of hiring employees and to the employment of all computer programmers and analysts since June 1, 1969, as well as all data relating to failure to employ any minority racial, ethnic, religious or national group in any capacity for whatever reason since June 1, 1969. Considering the scope of RCA's farflung operations and the number of its employees, the magnitude of the requested information was overwhelming. RCA served its Answers and Objections to plaintiff's Interrogatories on February 24, 1976 (D 26).

With respect to a number of the interrogatories it should be noted that RCA, as was its option under Rule 33(c) of the Federal Rules of Civil Procedure, offered to make available to plaintiff for examination, inspection and copying, the personnel records of RCA from which most of the information could be obtained, said records being the same records from which RCA would have had to obtain the data necessary to provide its Answers. Plaintiff failed to avail himself in any way of the offer made by RCA to allow him to examine the relevant personnel records and in fact, indicated no intention to examine

the records at any time. On August 6, 1976 Chief Judge Mishler ruled that plaintiff would be allowed no further discovery in this action unless and until he availed himself of this outstanding offer of RCA. Instead, on or about August 26, 1976 plaintiff, in direct contravention and disregard of that directive, served on RCA two additional sets of "Supplemental Interrogatories" (D 30, 31). RCA served its Answers and Objections on September 20, 1976 (D 35, 36).

Plaintiff then moved for an order compelling the defendant to produce documents (D 41) and to answer plaintiff's supplemental interrogatories (D 40). RCA cross-moved for an order pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for dismissal of the action and pursuant to Rule 26(c) that no further discovery be had in the action (D 43). These motions resulted in a Memorandum of Decision and Order of December 16, 1976 by Chief Judge Mishler in which he stated:

"On August 6, 1976, this court directed that plaintiff would be denied further discovery in this action unless and until he inspected the personnel records made available to him by RCA. Plaintiff has refused to avail himself of this opportunity and instead, has filed these motions which, in effect, seek to circumvent this court's order of August 6th. For example, the Rule 34 request seeks a production of the personnel files of computer programmers, analysts and engineers hired by RCA since June 1969. The plaintiff seeks to shift the burden of examining these files to RCA, when plaintiff, as readily as any RCA employee, could examine and select the files he requests." (D 45, p. 2)

The Court then held that:

"[S]ince we consider the August 6 ruling to be a protective order denying further discovery in this case, the plaintiff's motion to compel defendant to produce documents is denied.

"With respect to the motion to compel defendant to answer supplemental interrogatories, if RCA decides to call expert witnesses at the trial of this case, it is directed to supply the names of these witnesses to the plaintiff. Otherwise, the motion to compel answers to supplemental interrogatories is denied." (D 45, pp. 2-3)

Chief Judge Mishler concluded by directing the parties to appear for trial on December 22, 1976.

At trial Halder appeared, but then said he was not ready to proceed. The following is from the transcript of the trial:

"MR. HALDER: The Supreme Court said in McDonald Corporation vs. Green that on trial the plaintiff must be given a full and fair opportunity to demonstrate by competent evidence his position and hear the presumed reasons for my rejection are in fact covered up due to discrimination. Now I have been trying to get competent evidence for the last two years, but the defendants, with full support and approval of the Court, have declined to give me the competent evidence and therefore I am not ready for trial yet.

"THE COURT: Well, I have found that the defendant has fairly and fully disclosed all of the evidence that you are entitled to, that your persistent and unreasonable requests constitute harassment, and I have therefore denied your request for further pretrial discovery.

"I direct you to proceed or I will dismiss your complaint.

"MR. HALDER: It is up to you." (Trans. pp. 3-4)

After RCA put on its evidence the trial concluded by the Court's following declaration:

"Based on the record before me and the failure and the refusal of the plaintiff to proceed with his case, I find that the failure and refusal is solely for purpose of delay, and since any further delay will serve no purpose, and further, based on the record as developed by the defendant showing no merit to the plaintiff's claim:

"The complaint is dismissed and it is so ordered and the Clerk is directed to enter a judgment in favor of the defendant and against the plaintiff, dismissing the complaint."
(Trans. pp. 23-24)

In the course of this unreasonable discovery effort by Halder during which he was unwilling to examine the documents RCA offered to allow him to examine and inspect, plaintiff was busy on three separate occasions in drafting and filing amended complaints accompanied by motions seeking leave to so file. The first such motion was for an order granting the plaintiff leave to amend his complaint to include and enumerate the fourteen specific dates when he was refused employment after applying to defendant's various offices in New York, New Jersey, Florida and Massachusetts (D 5). Previous to this amendment and repeated in his first amended complaint, Halder indicates that the only real basis for suit was that the "only one conclusion" that could be drawn from these rejections was

that "denial of employment to me must be based on grounds extraneous to my professional merit, specifically . . . my national origin" (D 5, para. 9). Leave to amend was granted by Memorandum of Decision and Order of Judge Mishler on February 25, 1975 (D 7).

Not satisfied with his first amended complaint, Halder moved again for leave to amend his complaint less than 10 days after his earlier motion to amend was granted (D 10). His proposed second amended complaint differed from his previous complaint in two particulars, first, in naming additional parties defendant including RCA Global and various employees or ex-employees of RCA who either participated in the decision not to employ plaintiff or so informed him, and second, in adding a cause of action under 42 U.S.C. § 1981. After a detailed analysis of § 1981 Chief Judge Mishler denied plaintiff's motion to amend and dismissed the complaint on April 25, 1975 (D 14).

Subsequently, after this action was reopened, plaintiff again attempted to amend his first amended complaint seeking to now add to his complaint that defendant discriminated against him because of his color, religion and alienage, as well as his national origin (D 17). In his Memorandum of Decision and Order of February 9, 1976 Chief Judge Mishler noted that:

"Again plaintiff offers no factual allegations to support his claim, but instead asks this court to accept the further conclusion that from plaintiff's name defendant assumed his color, religion and alienage,⁴ and due to its policy of discrimination against plaintiff's particular color, religion and alienage, refused to hire him."

* * *

"'4' The amended complaint does not state plaintiff's color or religion, nor does it state how defendant would have known these facts about plaintiff."
(D 24, p. 3)

He, therefore, denied plaintiff's motion to amend the complaint, which denial appears to be in part the subject of the instant appeal.

Thus, after the attempted filings of an original and three amended complaints, of which one amended complaint was accepted by the District Court, an extended discovery struggle during which plaintiff has been afforded an opportunity to inspect RCA's relevant documents, which opportunity he has rejected, a trial at which plaintiff appeared but refused to try his case, and not one but two dismissals of his complaint, Halder now appeals to this Court. He does so despite the rejection of an appeal to this Court by him on almost exactly similar grounds but a few months earlier in Halder v. Sperry Rand, supra, as well as a holding of this Court that he "failed completely to make the requisite showing" for a preliminary injunction in

Halder v. Avis Rent-A-Car System, Inc., 541 F.2d 130, 131
(2d Cir. 1976) (affirming District Court's denial of applica-
tion for a preliminary injunction). Plaintiff's claim that

"since April 1975 the District Court, in active concert and co-operation with the multi-national and multi-billion dollar corporate defendants, has been, in every possible and even in some impossible ways trying to annihilate the poor and helpless plaintiff" (Pl. Brief at 3-4)

only displays the lack of merit and rationality to his appeal,
an appeal which should be summarily rejected.

ARGUMENT

I

DENIAL OF THE MOTION TO COMPEL ANSWERS TO INTERROGATORIES WAS NOT AN ABUSE OF DISCRETION

The District Court's decision and order (D 45) regarding discovery was primarily in response to motions by plaintiff to compel defendant to produce certain documents and to answer plaintiff's supplemental interrogatories dated August 21, 1976 and August 24, 1976. Since on August 6, 1976 the District Court "directed that plaintiff would be denied further discovery in this action unless and until he inspected the personnel records made available to him by RCA" (D 45, p. 2) it is patently clear that plaintiff's motion to compel defendant to answer plaintiff's supplemental interrogatories was properly denied by the District Court. In fact, that

motion as well as the service of such interrogatories were in direct contravention with, or as Chief Judge Mishler stated, sought "to circumvent this court's order of August 6th." (D 45, p. 2)

The motion to produce documents is no more meritorious. As the District Court stated:

"For example, the Rule 34 request seeks a production of the personnel files of computer programmers, analysts and engineers hired by RCA since June 1969. The plaintiff seeks to shift the burden of examining these files to RCA, when plaintiff, as readily as any RCA employee, could examine and select the files he requests." (D 45, p. 2)

This Court has already ruled against this same plaintiff on exactly the same issue in Halder v. Sperry Rand, Docket No. 76-7145 (2d Cir. November 15, 1976), where this Court stated:

"Since the burden of deriving the information that the appellant desired was the same for each of the parties, Rule 33(c), Fed.R.Civ.P., provides the appellees with the option of requiring Halder to inspect their business records at his own expense, see Burns v. Thiokol Chemical Corp., 483 F.2d 300 (5th Cir. 1973); Judge Mishler, accordingly, properly denied Halder's Rule 37 motion to compel discovery. The court's subsequent dismissal of the appellant's complaint pursuant to Rule 41(b) was not an abuse of discretion."

In Burns v. Thiokol Chemical Corp., 483 F.2d 300 (5th Cir. 1973), also a civil rights case, the plaintiff propounded interrogatories quite like Halder's. The defendant objected to them as irrelevant and unduly burdensome. Subsection (c) of Rule 33, Fed.R.Civ.P., giving an option to produce business records, was not then in effect (483 F.2d at 307 n.10). The District Court sustained the objections (on which if either ground it did not make clear (483 F.2d 304)), and the Fifth Circuit remanded the case with the following statement, pertinent to the instant case, as to the availability to the defendant of the option under Rule 33(c), to produce business records (483 F.2d at 307):

"Of course the particular details of the discovery process are committed to the sound discretion of the trial court. Knowing, by virtue of our mandate, that the information is relevant, and therefore, discoverable, the judge may wish to require full answers to the interrogatories. But that is not his only option.

"Since his initial ruling in this case, a new rule, F.R.Civ.P. 33(c) has been promulgated. It gives Thiokol the option to 'specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.'"

In the instant case, as in Halder v. Sperry Rand, supra, plaintiff seeks to have RCA do all of his work in organizing and selecting what might be relevant documents

and to have RCA prepare lists and computer printouts, not presently in existence in any form or format, solely for his convenience in prosecuting this action. This is just what Rule 33(c) of the Federal Rules of Civil Procedure sought to avoid. These documents simply do not exist; the documents that do exist, containing the raw data from which much of the information sought by plaintiff could have been derived with no more effort on plaintiff's part than would have been required of RCA personnel, have been made available for the plaintiff but he has not taken advantage of the opportunity to examine them.

Thus, the instant appeal of plaintiff, as well as the motions which are the subject of this appeal are just further examples of the acts through which plaintiff has sought to use discovery devices as harassment against RCA. They further demonstrate plaintiff's unwillingness to take upon himself any significant burden with respect to discovery, seeking to have RCA perform essentially the identical work he wishes to avoid, and to deny to RCA its right under Rule 33(c) of the Federal Rules of Civil Procedure to produce documents in lieu of answering interrogatories. In fact, if anything, the burden was lighter for Halder than it would have been for RCA since one, plaintiff knew what information he was most interested in and would have been swifter and more efficient

in his document search than would RCA, and second, he was more familiar with Indian surnames and thus could have found such personnel records with less trouble. Plaintiff has clearly failed to examine the business records of RCA offered him on February 24, 1976 (D 26, p. 6), about ten months before trial, though with considerable deviousness he has attempted to disguise this fact through self-serving letters, demands for additional documents, filing of new interrogatories and other acts, all apparently intended by him to give an appearance of active prosecution of this action on his part. This Court should not let him continue his tactics of delay and harassment, just as this Court has protected other defendants from such harassment:

"Judge Mishler accurately observed that Halder consciously used delay as a tactic of harassment. His failure to proceed with discovery over the period of several months was part of his plan. Dismissal of a complaint with prejudice for failure to prosecute is an appropriate sanction for such behavior. Link v. Wabash R. Co., 370 U.S. 626 (1970). See Michelsen v. Moore-McCormack Lines, 429 F.2d 394 (2d Cir. 1970); Ali v. A & G Co., slip op. 5759 (2d Cir. 1976)." Halder v. Sperry Rand, supra.

The District Court did not abuse its discretion in ordering a stay of discovery until plaintiff inspected the personnel records made available to him by defendant. Thus, it clearly could not have abused its discretion in denying plaintiff's motion to compel defendant to answer further inter-

rogatories; nor could it have abused its discretion denying plaintiff's motion to produce documents.

II

DISMISSAL OF THE COMPLAINT
FOR FAILURE TO PROCEED WAS
NOT AN ABUSE OF DISCRETION

This Court has stated that: "It is well settled that a dismissal with prejudice for failure to prosecute will not be reversed upon appeal except where there is a showing of an abuse of that discretion," Michelsen v. Moore-McCormack Lines, Inc., 429 F.2d 394, 395 (2d Cir. 1970), referring to the discretion of a trial judge to grant or deny a continuance. That principle requires affirmance here.

This Court in Halder v. Sperry Rand, supra, affirmed the District Court's dismissal of this plaintiff's virtually identical complaint on precisely these grounds:

"The court's subsequent [to Halder's motion compelling discovery] dismissal of the appellant's complaint pursuant to Rule 41(b) was not an abuse of discretion. Judge Mishler accurately observed that Halder consciously used delay as a tactic of harassment. His failure to proceed with discovery over the period of several months was part of his plan. Dismissal of a complaint with prejudice for failure to prosecute is an appropriate sanction for such behavior. Link v. Wabash R. Co., 370 U.S. 626 (1970). See Michelsen v. Moore-McCormack Lines, 429 F.2d 394 (2d Cir. 1970); Ali v. A & G Co., slip op. 5759 (2d Cir. 1976)."

Halder failed to proceed because, although some of his interrogatories had been answered and although he had been offered access to files which would have in large part answered other interrogatories propounded by him, he did not have any evidence to prove his case. His lack of discovery was due in all material and significant respects to his own failure to take up RCA's offer in its Answers and Objections to Plaintiff's Interrogatories served February 24, 1974 and in discussions before the District Court at the August 6, 1976 hearing to let him inspect RCA's personnel files which were primarily located at Cherry Hill, New Jersey. Because RCA had made that offer the District Court denied his motion to compel RCA to answer interrogatories requesting in large part the very information contained in those offered records.

The alleged inability of Halder to proceed in this case was thus largely a result of his own actions for which he must bear the responsibility. This is not a case where dismissal for failure to proceed might be improper because the plaintiff's unwillingness to proceed may not have been attributable to his own fault. Rather, it is a case where the plaintiff had evidence available to him well before trial but failed to pursue it. See Marshall v. Sielaff, 492 F.2d 917, 918 (3d Cir. 1974), where the Court also noted that

"The scope of appellate review of an order of dismissal is extremely narrow, confined solely to whether the trial court has abused its discretion [citations omitted]. . . . No precise rule can be laid down as to what circumstances justify a dismissal for failure to prosecute, but the procedural history of each case must be examined in order to make that determination."

The power of the court to prevent undue delays and to achieve the orderly disposition of cases must be weighed against the policy of law which favors disposition of litigation on its merits. The authority to dismiss for lack of prosecution is an inherent "control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962).

Halder failed to proceed when, after his extended series of motions, the case was finally called for trial. His inability to proceed was clearly his own fault. The District Court's dismissal for Halder's failure to proceed was thus clearly not an abuse of discretion.

III

DENIAL OF THE MOTION TO AMEND THE COMPLAINT FOR A THIRD TIME WAS NOT AN ABUSE OF DISCRETION

Halder's proposed fourth complaint would have added color, religion and alienage (to national origin) as alleged grounds of discrimination against him by RCA, and it

would have added the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981, to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. It also would have added RCA Global as a party-defendant.

The latter proposed amendment can be disposed of summarily. RCA Global was never served with a summons or complaint. No charges were ever filed with the EEOC as regards alleged discrimination by RCA Global. And in fact the charges which Halder did file with the EEOC against RCA on or about February 21, 1971 were from 2 3/4 to 3 3/4 years prior to Halder's applications for employment with RCA Global, according to his amended complaints (D 5). Thus, it is clear that the District Court had no jurisdiction over RCA Global, and to say the least, did not abuse its discretion in denying plaintiff's motion to amend his complaint in this regard.*

Halder's plea to amend his complaint to add a cause of action under 42 U.S.C. § 1981, and, years after the original charges were filed, to also add that RCA has discriminated against him because of his color, religion and alienage is no more meritorious. In fact, his totally similar motion to amend the complaint in Halder v. Sperry Rand, supra, which

* 42 U.S.C. § 2000e-5(f)(1) states that "a civil action may be brought against the respondent named in the charge [before the EEOC]".

motion was denied by the District Court, was not even specifically considered in this Court's affirmance of the trial court's dismissal in that case. Instead this Court stated as regards, inter alia, the motion to amend:

"We have fully examined appellant's other claims and find them without merit." Halder v. Sperry Rand, supra, at 2.

At the outset it should be noted that Halder's original and first amended complaints did not even mention any alleged discrimination by RCA on account of color, religion or alienage. In fact in his EEOC charge (D 5, p. 3) in answer to the question,

WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☐
Sex ☐

Halder did not check "race or color" or "religious creed", nor did he anywhere allege such discrimination.

Halder had once before attempted to add a § 1981 claim to his case, but that attempt was discussed and rejected by Chief Judge Mishler when he dismissed the action for the first time (D 14, p. 7). After noting that § 1981 was derived from the 1870 re-enactment of the Civil Rights Act of 1866 seeking to eliminate discrimination based on color and race the Court cited Georgia v. Rachel, 384 U.S. 780 (1966), and Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), for the proposition that § 1981 is clearly limited to racial discrim-

ination, and does not encompass other forms of discrimination. See also Schetter v. Heim, 300 F.Supp. 1070, 1073 (E.D. Wisc. 1969); Abshire v. Chicago & Eastern Ill. R.R., 352 F.Supp. 601, 605 (N.D. Ill. 1972); Agnew v. City of Compton, 239 F.2d 226, 230 (9th Cir. 1956); Olson v. Rembrandt Printing Co., 375 F.Supp. 413, 417 (E.D.Mo. 1974). But see Sud v. Import Motors Ltd., 379 F.Supp. 1064, 1071 (W.D. Mich. 1974).

In fact, in Kurylas v. U.S. Department of Agriculture, 373 F.Supp. 1072 (D.D.C. 1974), aff'd without opinion, 514 F.2d 894 (D.C. Cir. 1975), a case involving claims of national origin discrimination as here, the Court stated:

"Section 1981 was originally enacted as part of the Civil Rights Act of 1866, 14 Stat. 27, designed to enforce the then recently adopted Thirteenth Amendment. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422-444, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). Thus, § 1981 is directed specifically at racial discrimination. . . . The Court concludes that the plaintiff's allegation of discrimination due to his national origin is insufficient to sustain a cause of action under § 1981 and that his § 1981 action should therefore be dismissed." (Emphasis in original.) 373 F. Supp. 1075-76.

Given this denial of plaintiff's motion to amend his complaint for the second time, his response was predictable: a third amended complaint which included race among other

reasons for defendant's alleged discrimination (D 17).

The District Court in denying Halder's similar motion in Halder v. Avis Rent-A-Car System, 74 C. 1552 (E.D.N.Y. Jan. 22, 1976) made reference to this maneuver:

"In another action, this court denied a request by plaintiff to amend his complaint to include a cause of action under 42 U.S.C. § 1981 because § 1981 does not give redress to discrimination because of national origin. Halder v. RCA Corp., 74-C-1375 (E.D.N.Y. April 25, 1975). Since that decision plaintiff's requests to amend his various complaints have all added discrimination because of color, religion and alienage to support his § 1981 action."

Chief Judge Mishler, in denying Halder leave to amend for the third time, which denial Halder attacks in his brief, dealt at length with Halder's new found claims in his decision of February 9, 1976 (D 24, pp. 2-4). Noting that plaintiff's original complaint contended "only one conclusion" could be drawn from the facts as plaintiff alleged them, that "defendant must have discriminated against him because of his national origin," the Court compared his original complaint with the new allegations on the grounds of discrimination by reason of race, color and alienage:

"Again plaintiff offers no factual allegations to support his claim, but instead asks this court to accept the further conclusion that from plaintiff's name defendant assumed his color, religion and alienage,⁴ and due to its policy of discrimination against plaintiff's

particular color, religion and alienage, refused to hire him. The court assumes that there are Indians of various races and religious persuasions. Plaintiff's speculation that defendant used his name as a basis for a charge of discriminatory employment practices is insufficient as a matter of law.

* * *

"'4' The amended complaint does not state plaintiff's color or religion, nor does it state how defendant would have known these facts about plaintiff."
(D 24, p. 3)

Thus while being unable to succeed on his single-ground claim (national origin), and, in fact, while being unwilling to even pursue means by which he could hope to discover evidence in support of that claim, Halder chose instead to amend his original complaint -- a third time -- by alleging three new grounds of discrimination by RCA. The factual setting out of which this action grew has not changed at all. Halder offers no facts to substantiate his new claims (of color, religious and alienage discrimination). He made no mention of his color or religion (as he did of his alienage) in the resume sent to RCA (RCA Ex. D) and now offers no theory as to how RCA might have been able to ascertain his color or religion in order to discriminate against him. He has subjected RCA to charges of discrimination because of his national origin since February 1971, when he filed such charges with the EEOC. Such national-origin charges were all that the EEOC investigated. RCA has answered to and prepared its cases against

charges of discrimination based on national origin. Halder had a full and adequate remedy under Title VII.

It would also appear that the question of amendment of the complaint is a totally moot issue. Presumably Halder would have refused the discovery offered him by RCA, as he did in the context of his Title VII national origin claim, as the documentation that could have and would have been offered him by RCA would have been identical. Thus Halder would clearly have been no more ready or willing to proceed on a § 1981 claim or on the issues of discrimination by reason of color, religion and alienage than he was at the trial herein and these claims would have been properly dismissed on the same basis.

Given this background it can hardly be said that justice was hindered by the District Court's refusal of Halder's request to amend, a third time, his complaint against RCA. Certainly the denial of this motion was not an abuse of the District Court's discretion.

CONCLUSION

The District Court's judgment dismissing the complaint with costs should be affirmed in all respects.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X
BISWANATH HALDER,

Plaintiff-Appellant,

-against-

RCA CORPORATION,

Defendant-Appellee
----- X

:
: Index No. 77-7052

:
: AFFIDAVIT OF SERVICE

STATE OF NEW YORK)

COUNTY OF NEW YORK)

: ss.:
)

PETER K. DEMMERLE, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to
this action.

2. On the 13th day of May, 1977, I served the annexed
Brief upon:

Biswanath Halder
173-17 65th Avenue
Flushing, N.Y. 11365

by depositing two true and correct copies thereof in the United
States Post Office at 73 Pine Street, New York, New York, enclosed
in a stamped, sealed envelope addressed to the above-mentioned
person.

Peter K. Demmerle
Peter K. Demmerle

Sworn to before me this

13th day of May, 1977

Robert R. Cawthra, Jr.
Notary Public

ROBERT R. CAWTHRA, JR.
Notary Public, State of New York
No. 31-0605710
Qualified in New York County
Commission Expires March 30, 1979